

CONSENT DECREE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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:
UNITED STATES OF AMERICA, :
:
Plaintiff, :
:
- against - :
:
CITY OF NEW YORK, :
:
Defendant. :
:
- - - - - x

02 Civ. 9653 (RJH) (KNF)

CONSENT DECREE

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WHEREAS, Plaintiff United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), has filed a complaint in this action on December 5, 2002, alleging that Defendant the City of New York ("Defendant" or the "City"), violated Section 9006 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 and the Hazardous Waste and Solid Waste Amendments of 1984 (the "Act"), 42 U.S.C. § 6901 et seq., and the regulations promulgated thereunder, codified at 40 C.F.R. Part 280, regarding numerous "underground storage tanks" or "USTs" and "UST systems" that are owned and/or operated by the City;

WHEREAS, the Complaint against the City alleges that the City failed to meet numerous requirements mandated by the Act and its implementing regulations, including requirements to (1) upgrade UST systems; (2) provide methods of release detection for UST systems; (3) maintain and furnish records concerning compliance with release detection methods; (4) report, investigate, and confirm suspected releases of regulated substances; (5) comply with performance standards for new UST systems; (6) close UST systems; (7) maintain and furnish records concerning compliance with closure requirements; (8) provide notice of existence of UST systems; and (9) respond to a request for information regarding UST systems;

WHEREAS, the City does not admit any liability to the United States arising out of the transactions or occurrences alleged in the Complaint; and

WHEREAS, the Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest;

NOW, THEREFORE, with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action, pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 9006(a)(1) of the Act, 42 U.S.C. § 6991e(a)(1), and over the Parties. Venue lies in this District pursuant to Section 9006(a) of the Act, 42 U.S.C. § 6991e(a), and 28 U.S.C. §§ 1391 and 1395(a), because many of the violations alleged in the Complaint occurred within this District, and the City is located in this District. For purposes of this Decree, or any action to enforce this Decree, the City consents to the Court's jurisdiction over this Decree or such action and over the City, and consents to venue in this judicial district.

2. For purposes of this Consent Decree, the City

agrees that the Complaint states claims upon which relief may be granted pursuant to Section 9006(a) of the Act, 42 U.S.C. § 6991 et seq.

II. APPLICABILITY

3. The obligations of this Consent Decree apply to and are binding upon the United States, and upon the City and any successors, assigns, or other entities or persons otherwise bound by law.

4. No transfer of ownership or operation of the Facilities (defined at Paragraph 7(f), below), whether in compliance with this Paragraph or otherwise, shall relieve the City of its obligation to ensure that the terms of the Decree are implemented. Any transfer of ownership or operation of the Facilities to any other person must be conditioned upon the transferee's agreement to undertake the obligations required by this Decree, as provided in a written agreement between the City and the proposed transferee, enforceable by the United States as third-party beneficiary of such agreement. At least 30 days prior to such transfer, the City shall provide a copy of this Consent Decree to the proposed transferee and shall simultaneously provide written notice of the prospective transfer, together with a copy of the proposed written agreement, to EPA Region 2, the United States Attorney for the Southern District of

New York, and the United States Department of Justice, in accordance with Section XIV of this Decree (Notices). Any attempt to transfer ownership or operation of the Facilities without complying with this Paragraph constitutes a violation of this Decree.

5. The City shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Decree, as well as to any contractor retained to perform work required under this Consent Decree. The City shall condition any such contract upon performance of the work in conformity with the terms of this Consent Decree.

6. In any action to enforce this Consent Decree, the City shall not raise as a defense the failure by any of its officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Decree.

III. DEFINITIONS

7. Terms used in this Consent Decree that are defined in the Act, 42 U.S.C. §§ 6991-6991i or in regulations promulgated pursuant to the Act, 40 C.F.R. Part 280, shall have the meanings assigned to them in the Act or such regulations, unless otherwise provided in this Decree. Whenever the terms set forth below are

used in this Consent Decree, the following definitions shall apply:

a. "Complaint" shall mean the complaint filed by the United States in this action;

b. "Consent Decree" or "Decree" shall mean this Decree and all appendices attached hereto (listed in Section XXIII);

c. "Day" shall mean a calendar day unless expressly stated to be a working day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day;

d. "Defendant" shall mean the City of New York, a municipal corporation organized pursuant to the laws of the State of New York, and all agencies of the City that own and/or operate USTs and/or UST systems subject to the federal regulations promulgated pursuant to the Act, 42 U.S.C. § 6991 et seq., set forth in 40 C.F.R. Part 280;

e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States;

f. "Facilities" shall mean all USTs and UST systems owned and/or operated by the City, located in the New

York City area, including, but not limited to, the Bronx, Brooklyn, Manhattan, Queens and Staten Island, and Westchester counties;

g. "Interest" shall mean interest at the rate specified in 28 U.S.C. § 1961 as of the date the Consent Decree is lodged with the Court.

h. "Paragraph" shall mean a portion of this Decree identified by an arabic numeral;

i. "Parties" shall mean the United States and the City;

j. "Section" shall mean a portion of this Decree identified by a roman numeral;

k. "State" shall mean the State of New York.

l. "United States" shall mean the United States of America, acting on behalf of EPA;

m. "UST" shall have the meaning defined in Section 9001(1), 42 U.S.C. § 6991(1), and in 40 C.F.R. § 280.12.

n. "UST system" shall have the meaning defined in 40 C.F.R. § 280.12.

IV. CIVIL PENALTY

8. Within sixty (60) days after the Effective Date of this Consent Decree, the City shall pay the sum of \$1,300,000.00 as a civil penalty. Payment shall be made by FedWire Electronic

Funds Transfer ("EFT") to the U.S. Department of Justice in accordance with instructions to be provided to the City, following lodging of the Consent Decree, by the Financial Litigation Unit of the U.S. Attorney's Office for the Southern District of New York. Within two days of the date of payment, the City shall send written notice of payment (which should reference DOJ case number 90-7-1-07807; U.S. Attorney's Office case number 2002V00476; and the civil action number of this case) to the United States in accordance with Section XIV of this Decree (Notices). The City shall pay interest at the rate specified in 28 U.S.C. § 1961 on any portion of the civil penalty that is not paid within sixty (60) days after the Effective Date of this Consent Decree.

V. COMPLIANCE REQUIREMENTS

9. Within 30 days after the Effective Date of this Consent Decree, the City shall comply with all applicable provisions of Sections 9001-9010 of the Act, 42 U.S.C. §§ 6991-6991i, and its implementing regulation, 40 C.F.R. Part 280, with respect to the Facilities, except as specifically provided in Paragraph 10.

10. The City shall:

a. Except as provided in paragraph 10(b), comply with upgrade requirements set forth at 40 C.F.R. § 280.21 or

permanent closure requirements set forth at 40 C.F.R. § 280.71 no later than one (1) year from the Effective Date of this Consent Decree. If the City elects to close USTs permanently, it shall comply with temporary closure requirements set forth at 40 C.F.R. § 280.70 no later than ninety (90) days from the Effective Date of this Consent Decree; and

b. For those USTs listed in Appendix A to this Consent Decree, comply with upgrade requirements set forth at 40 C.F.R. § 280.21 in accordance with the schedule set forth in Appendix A; and

c. Comply with release detection requirements set forth at 40 C.F.R. Part 280, subpart D, no later than thirty (30) days from the Effective Date of this Consent Decree; and

d. Comply with notification requirements set forth at 40 C.F.R. § 280.22, as well as Section 9002(a)(1) of the Act, 42 U.S.C. 6991a(a)(1), no later than thirty (30) days from the Effective Date of this Consent Decree.

VI. CENTRALIZED MONITORING PROGRAM

11. The City shall implement a program to monitor, from a central location or central locations, release detection at all of the Facilities with USTs subject to the release detection requirements set forth at 40 C.F.R. Part 280, subpart D, owned and/or operated by three City agencies: the Fire

Department of New York ("FDNY"), the Department of Transportation ("DOT"), and the New York Police Department ("NYPD") (collectively, the "Three City Agencies") in accordance with this Section of the Consent Decree (the "Centralized Monitoring Program" or "CMP"). The CMP shall require the Three City Agencies to monitor, from a central location or central locations, all of the Three City Agencies' Facilities with USTs subject to the release detection requirements set forth at 40 C.F.R. Part 280, subpart D, for actual and potential releases, and for alarms, for a period of at least three years. The City must install release detection equipment compatible for the CMP at the Three City Agencies' facilities, or upgrade substandard release detection equipment and/or equipment that is not compatible with the CMP, as necessary.

12. The CMP shall be satisfactorily implemented within eighteen (18) months after approval by EPA of the Plans and Specifications for implementation of the CMP, or in accordance with the schedule proposed by the City and approved by EPA, as set forth in Paragraph 13, below. "Satisfactory implementation" means that the City shall complete the work on capital improvements required for the CMP, and have a fully operational monitoring system in place for all of the Facilities with USTs subject to the release-detection requirements set forth at 40

C.F.R. Part 280, subpart D, owned and/or operated by the Three City Agencies in accordance with the requirements of this Decree, as well as with all work plans and specifications for the project (the "Plans and Specifications") that have been approved by EPA in accordance with Paragraph 13 of this Decree. The City may use contractors or consultants in planning and implementing the CMP.

13. Approval of Plans and Specifications. Prior to the commencement of any work on the CMP, and no later than ninety (90) days after the Effective Date, the City shall provide the Plans and Specifications for the project to EPA for review and approval. After review of the Plans and Specifications that are required to be submitted pursuant to this Consent Decree, EPA shall, in writing: (a) approve the submission; (b) approve the submission upon specified conditions; (c) approve part of the submission and disapprove the remainder; or (d) disapprove the submission.

14. If the Plans and Specifications are approved pursuant to Paragraph 13(a), the City shall take all actions required by the Plans and Specifications in accordance with the schedules and requirements of the Plans and Specifications, as approved. If the submission is conditionally approved or approved only in part, pursuant to Paragraph 13(b) or (c), the City shall, upon written direction of EPA, take all actions

required by the approved schedules, Plans and Specifications, or other items that EPA determines are technically severable from any disapproved portions, subject to the City's right to dispute only the specified conditions or the disapproved portions, under Section X of this Decree (Dispute Resolution).

15. If the submission is disapproved in whole or in part pursuant to Paragraph 13(c) or (d), the City shall, within thirty (30) days or such other time as the Parties agree to in writing, correct all deficiencies and resubmit the plan, report, or other item, or disapproved portion thereof, for approval, in accordance with the preceding Paragraphs. If the resubmission is approved in whole or in part, the City shall proceed in accordance with the preceding Paragraph.

16. Any Stipulated Penalties applicable to the original submission, as provided in Section VIII of this Decree, shall accrue during the 30-day period or other specified period, but shall not be payable unless the resubmission is untimely or is disapproved in whole or in part; provided that, if the original submission was so deficient as to constitute a material breach of the City's obligations under this Decree, the Stipulated Penalties applicable to the original submission shall be due and payable notwithstanding any subsequent resubmission.

17. If a resubmitted plan, report, or other item, or

portion thereof, is disapproved in whole or in part, EPA may again require the City to correct any deficiencies, in accordance with the preceding Paragraphs, subject to the City's right to invoke Dispute Resolution and the right of EPA to seek Stipulated Penalties as provided in the Consent Decree.

18. CMP Implementation Report. Within sixty (60) days after implementation of the CMP, the City shall submit a CMP Implementation Report to the United States for each of the Three City Agencies listed in paragraph 11, above, in accordance with Section XIV of this Consent Decree (Notices). Each CMP Implementation Report shall be signed by an authorized representative of the City, and, if applicable and as described more fully below, an authorized representative of the contractor or consultant responsible for implementing the CMP, and shall contain the following information:

- a. A detailed description of the CMP as implemented;
- b. A description of any problems encountered in implementing the CMP and the solutions thereto;
- c. A certification by an authorized representative of the contractor or consultant responsible for implementing the CMP that the CMP has been fully implemented in accordance with the Plans and Specifications approved by EPA

pursuant to Paragraphs 13-15 of this Decree; and

d. A certification by an authorized representative of the City that the CMP has been fully implemented.

e. EPA may, in its sole discretion, require information in addition to that described in subparagraphs (a)-(d), in order to determine the adequacy of CMP implementation, and the City shall provide such information within thirty (30) days after EPA's request.

19. After receiving the CMP Implementation Report, the United States shall notify the City whether or not the City has satisfactorily implemented the CMP. If the CMP has not been satisfactorily implemented in accordance with all applicable Plans and Specifications, Stipulated Penalties may be assessed under Section VIII of this Consent Decree.

20. Disputes concerning the satisfactory implementation of the CMP may be resolved under Section X of this Decree (Dispute Resolution).

21. Each certification submitted under this Section shall bear the certification language set forth in Paragraph 26, below.

22. Any public statement, oral or written, in print, film, or other media, made by the City making reference to the

CMP under this Decree shall include the following language:

"This project was undertaken in connection with the settlement of an enforcement action, United States v. City of New York, taken on behalf of the U.S. Environmental Protection Agency under the Resource Conservation and Recovery Act."

VII. REPORTING REQUIREMENTS

23. The City shall submit the following reports:

a. Within 30 days after the end of each calendar-year quarter (i.e., by April 30, July 31, October 31, and January 31) after lodging of this Consent Decree, until termination of this Decree pursuant to Section XVIII, the City shall submit in writing a quarterly report for the preceding quarter that shall include: status of any upgrades, closure or replacement of the USTs and/or UST systems subject to the regulations set forth in 40 C.F.R. Part 280, including completion of milestones; problems encountered or anticipated, together with implemented or proposed solutions; a description of operation and maintenance activities; and copies of any reports submitted to state agencies (the "Upgrade Report").

b. Within 30 days after the end of each calendar-year quarter (i.e., by April 30, July 31, October 31, and January 31) after lodging of this Consent Decree, until termination of this Decree pursuant to Section XVIII, the City

shall submit in writing a CMP quarterly report for each of the Three City Agencies for the preceding quarter that shall include: status of any CMP-related construction or compliance measures; completion of milestones; problems encountered or anticipated, together with implemented or proposed solutions; monthly Site Compliance Reports generated by a contractor/consultant for each of the Three City Agencies pursuant to the CMP showing status of operation of the CMP and status of monitoring under the CMP once implemented; agency facility reports providing a description of operation and maintenance activities; and copies of any reports submitted to state agencies (the "CMP Quarterly Report").

c. If the City violates, or has reason to believe that it may violate, any requirement of this Consent Decree, the City shall notify the United States of such violation and its likely duration, in writing, within fifteen (15) days of the day the City first becomes aware of the violation, with an explanation of the violation's likely cause and of the remedial steps taken, or to be taken, to prevent or minimize such violation. If the cause of a violation cannot be fully explained at the time the report is due, the City shall so state in the report. The City shall investigate the cause of the violation and shall then submit an amendment to the report, including a full explanation of the cause of the violation, within 30 days of

the day the City becomes aware of the cause of the violation. Nothing in this Paragraph or the following Paragraph relieves the City of its obligation to provide the notice required by Section IX of this Consent Decree (Force Majeure).

24. Whenever any violation of this Consent Decree or any other event affecting the City's performance under this Decree, or the performance of its Facilities, may pose an immediate threat to the public health or welfare or the environment, the City shall notify EPA orally or by electronic or facsimile transmission as soon as possible, but no later than 24 hours after the City first knew of, or should have known of, the violation or event. This procedure is in addition to the requirements set forth in the preceding Paragraph. EPA may require or order the City to take action or EPA may itself take action it deems appropriate to the extent authorized by law.

25. All reports shall be submitted to the persons designated in Section XIV of this Consent Decree (Notices).

26. Each report submitted by the City under this Section shall be signed by an official of the submitting party and include the following certification:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments and that this document and its attachments were prepared either by me personally or under my direction or supervision in a

manner designed to ensure that qualified and knowledgeable personnel properly gather and present the information contained therein. I further certify, based on my personal knowledge or on my inquiry of those individuals immediately responsible for obtaining the information, that the information is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowingly and willfully submitting a materially false statement.

This certification requirement does not apply to emergency or similar notifications where compliance with these requirements would be impractical.

27. The reporting requirements of this Consent Decree do not relieve the City of any reporting obligations required by the Act or implementing regulations, or by any other federal, state, or local law, regulation, permit, or other requirement.

28. Any information provided pursuant to this Consent Decree may be used by the United States in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

VIII. STIPULATED PENALTIES

29. If the City fails to pay the Civil Penalty required to be paid under Section IV of this Decree (Civil Penalty) when due, the City shall pay a stipulated penalty of \$1,000.00 per day for each day that the payment is late. Late

payment of the civil penalty shall be made in accordance with Section IV, Paragraph 8, above. Stipulated Penalties shall be paid in accordance with Section VIII, Paragraph 37, below. All transmittal correspondence shall state that any such payment is for late payment of the civil penalty due under this Decree, or for Stipulated Penalties for late payment, as applicable, and shall include the identifying information set forth in Paragraph 8, above.

30. The City shall be liable for Stipulated Penalties to the United States for violations of this Consent Decree as specified below, unless such penalties are reduced or waived by the United States in accordance with Paragraph 35 below or excused under Section IX (Force Majeure) below. A violation includes failing to perform any obligation required by the terms of this Decree, including any plan or schedule approved under this Decree, according to all applicable requirements of this Decree and within the specified time schedules established by or approved under this Decree.

31. Compliance Requirements and Milestones: Except as otherwise provided in paragraphs 32(b) and 32(c), the following Stipulated Penalties shall accrue per violation per day for each violation of the Compliance Requirements identified in Paragraphs 9 and 10:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$600.00	1st through 14th day
\$1,000.00	15th through 30th day
\$2,000.00	31st day and beyond

32. Centralized Monitoring Requirements. The following Stipulated Penalties shall accrue per violation per day for each violation of the requirement specified:

a. If the City fails to satisfactorily implement the CMP within eighteen (18) months after the date of approval by EPA of the Plans and Specifications, or in accordance with the schedules approved by EPA, as set forth in Section VI of this Consent Decree, the City shall pay Stipulated Penalties for such failure, as follows:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$600.00	1st through 30th day
\$1,000.00	31st through 60th day
\$2,000.00	61st day and beyond

Such penalties shall accrue from the date the City was required to satisfactorily implement the CMP, until satisfactory implementation is achieved.

b. If, from thirty (30) days after the Effective Date of this Consent Decree until the deadline for satisfactory implementation of the CMP, the City fails to comply with release-

detection requirements at USTs and/or UST systems covered under the CMP, as required by 40 C.F.R. Part 280, subpart D, the City shall pay a Stipulated Penalty for each UST per each day the release-detection requirements are not met, in addition to any penalty required under Subparagraphs (a)-(c) of this Section, as follows:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$600.00	1st through 14th day
\$1,000.00	15th through 30th day
\$2,000.00	31st day and beyond

c. If, from the date of satisfactory implementation of the CMP, until the conclusion of the three-year CMP monitoring period, the City fails to comply with release-detection requirements at USTs and/or UST systems covered under the CMP, the City shall pay a Stipulated Penalty for each UST per each day the release-detection requirements are not met, in addition to any penalty required under Subparagraphs a-b of this Section, as follows:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$300.00	1st through 14th day
\$500.00	15th through 30th day
\$1,000.00	31st day and beyond

33. Reporting Requirements. The following Stipulated

Penalties shall accrue per violation per day for each violation of the reporting requirements of Paragraph 18 and Section VII of this Consent Decree:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$300.00	1st through 30th day
\$500.00	31st through 60th day
\$2,000.00	61st day and beyond

34. Stipulated Penalties under this Section shall begin to accrue on the day after performance is due or on the day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Stipulated Penalties shall accrue simultaneously for separate violations of this Consent Decree. The City shall pay any Stipulated Penalty within sixty (60) days of receiving the United States' written demand.

35. The United States may, in the unreviewable exercise of its discretion, reduce or waive Stipulated Penalties otherwise due it under this Consent Decree.

36. Stipulated Penalties shall continue to accrue as provided in Paragraph 34, above, during any Dispute Resolution, with Interest on accrued penalties payable and calculated at the rate established by the Secretary of the Treasury, pursuant to 28 U.S.C. § 1961, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of the United States that is not appealed to the Court, the City shall pay accrued penalties determined to be owing, together with Interest, to the United States within 30 days of the effective date of the agreement or the receipt of the United States' decision or order;

b. If the dispute is appealed to the Court and the United States prevails in whole or in part, the City shall pay all accrued penalties determined by the Court to be owing, together with Interest, within 60 days of receiving the Court's decision or order, except as provided in Subparagraph c, below;

c. If any Party appeals the District Court's decision, the City shall pay all accrued penalties determined to be owing, together with Interest, within 15 days of receiving the final appellate court decision.

37. The City shall, as directed by the United States in its demand, pay Stipulated Penalties owing to the United States by EFT in accordance with Section IV, Paragraph 8, above or by check in the amount due, payable to the "U.S. Department of Justice," referencing DOJ No. 90-7-1-07807 and United States Attorney's Office file number 2002V00476, and delivered to the office of the United States Attorney, Southern District of New York, 86 Chambers Street, 3rd Floor, New York, NY 10007,

Attention: Financial Litigation Unit.

38. If the City fails to pay Stipulated Penalties according to the terms of this Consent Decree, the City shall be liable for Interest on such penalties, as provided for in 28 U.S.C. § 1961, accruing as of the date payment became due.

39. Subject to the provisions of Section XII of this Consent Decree (Effect of Settlement/Reservation of Rights), the Stipulated Penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the United States for Defendant's violation of this Consent Decree or applicable law. Where a violation of this Consent Decree is also a violation of applicable statutory provisions of the Act, 42 U.S.C. § 6991 et seq., and/or its implementing regulation, 40 C.F.R. Part 280, the City shall be allowed a credit, for any Stipulated Penalties paid, against any statutory penalties imposed for such violation.

IX. FORCE MAJEURE

40. A "force majeure event" is any event beyond the control of the City, its contractors, or any entity controlled by the City that delays the performance of any obligation under this Consent Decree despite Defendant's best efforts to fulfill the obligation. "Best efforts" includes anticipating any potential force majeure event and addressing the effects of any such event

(a) as it is occurring and (b) after it has occurred, to prevent or minimize any resulting delay to the greatest extent possible. "Force Majeure" does not include the City's financial inability to perform any obligation under this Consent Decree.

41. The City shall provide notice orally or by electronic or facsimile transmission as soon as possible, but not later than 72 hours after the time the City first knew of, or by the exercise of due diligence, should have known of, a claimed force majeure event. The City shall also provide written notice, as provided in Section XIV of this Consent Decree (Notices), within seven days of the time the City first knew of, or by the exercise of due diligence, should have known of, the event. The notice shall state the anticipated duration of any delay; its cause(s); the City's past and proposed actions to prevent or minimize any delay; a schedule for carrying out those actions; and the City's rationale for attributing any delay to a force majeure event. Failure to provide oral and written notice as required by this Paragraph shall preclude the City from asserting any claim of force majeure.

42. If the United States agrees that a force majeure event has occurred, the United States may agree to extend the time for the City to perform the affected requirements for the time necessary to complete those obligations. An extension of

time to perform the obligations affected by a force majeure event shall not, by itself, extend the time to perform any other obligation. Where the United States agrees to an extension of time of more than thirty (30) days, the appropriate modification shall be made pursuant to Section XVII of this Consent Decree (Modification). An extension of thirty (30) days or fewer shall not be considered a material change to this Consent Decree within the meaning of Section XVII herein.

43. If the United States does not agree that a force majeure event has occurred, or does not agree to the extension of time sought by the City, the United States' position shall be binding, unless the City invokes Dispute Resolution under Section X of this Consent Decree. In any such dispute, the City bears the burden of proving, by a preponderance of the evidence, that each claimed force majeure event is a force majeure event; that the City gave the notice required by Paragraph 41; that the force majeure event caused any delay the City claims was attributable to that event; and that the City exercised best efforts to prevent or minimize any delay caused by the event.

X. DISPUTE RESOLUTION

44. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising

under or with respect to this Consent Decree. However, such procedures shall not apply to actions by the United States to enforce obligations of the City that have not been disputed in accordance with this Section.

45. Informal Dispute Resolution. Any dispute subject to dispute resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when the City sends the United States a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed 20 days from the date the dispute arises, unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within 20 days after the conclusion of the informal negotiation period, the City invokes formal dispute resolution procedures as set forth below.

46. Formal Dispute Resolution. The City shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the United States a written Statement of Position regarding the matter in dispute. The Statement of Position shall include any factual data, analysis, or opinion supporting Defendant's position and

any supporting documentation relied upon by the City.

47. The United States shall serve its Statement of Position within 45 days of receipt of the City's Statement of Position. The United States' Statement of Position shall include any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the United States. The United States' Statement of Position shall be binding on the City, unless the City files a motion for judicial review of the dispute in accordance with the following Paragraph.

48. The City may seek judicial review of the dispute by filing with the Court and serving on the United States, in accordance with Section XIV of this Consent Decree (Notices), a motion requesting judicial resolution of the dispute. The motion must be filed within thirty (30) days of receipt of the United States' Statement of Position pursuant to the preceding Paragraph. The motion shall contain a written statement of the City's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

49. The United States shall respond to the City's motion within the time period allowed by the Local Rules of this

Court. The City may file a reply memorandum, to the extent permitted by the Local Rules.

50. In judicial review of any dispute brought under Paragraph 48, the City shall bear the burden of demonstrating that its position complies with this Consent Decree and the Act and that the City is entitled to relief under applicable law. The United States' decision shall be reviewable only on the administrative record of the dispute and must be upheld unless arbitrary and capricious or otherwise not in accordance with law.

51. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of the City under this Consent Decree, unless and until final resolution of the dispute so provides. Stipulated Penalties with respect to the disputed matter shall continue to accrue from the first day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 36, above. If the City does not prevail on the disputed issue, Stipulated Penalties shall be assessed and paid as provided in Section VIII (Stipulated Penalties).

XI. INFORMATION COLLECTION AND RETENTION

52. The United States and its representatives, including attorneys, contractors, and consultants, shall have the

right of entry and/or access to any Facility covered by this Consent Decree, at all reasonable times, upon presentation of credentials, to:

a. monitor the progress of activities required under this Consent Decree;

b. verify any data or information submitted to the United States in accordance with the terms of this Consent Decree;

c. obtain samples and, upon request in advance of performance of sampling, splits of any samples taken by the City or its representatives, contractors, or consultants;

d. obtain documentary evidence, including photographs and similar data; and

e. assess the City's compliance with this Consent Decree.

53. Upon request in advance of performance of sampling, the City shall provide EPA or its authorized representatives splits of any samples taken by the City. Upon advance request, EPA shall provide the City splits of any samples taken by EPA.

54. Until five years after the termination of this Consent Decree (other than the provisions of this Paragraph and Paragraph 55), the City shall retain, and shall instruct its

contractors and agents to preserve all records required by 40 C.F.R. §§ 280.34 and 280.45, as well as all non-identical copies of all documents, records, or other information (including documents, records, or other information in electronic form) in its or its contractors' or agents' possession or control, or that come into its or its contractors' or agents' possession or control, and that concern the City's performance of its obligations under this Consent Decree. Such documents include, but are not limited to: work orders, plans, specifications, release detection reports (monthly), corrosion monitoring (impressed and sacrificial), repair records, upgrade records, closure records, site assessment reports, installation certifications, incident reports, status reports, invoices, contracts, purchase orders, tank tightness testing records and spill reports. This information-retention requirement shall apply regardless of any contrary municipal, corporate or institutional policies or procedures. At any time during this information-retention period, the United States may request copies of any documents, records, or other information required to be maintained under this Paragraph. The City may assert that certain documents, records, or other information subject to the requirements of this Paragraph are privileged under the attorney-client privilege or any other privilege recognized by federal

law. If the City asserts such a privilege, it shall provide the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of each author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by the City. However, no documents, records, or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on grounds of privilege.

55. For a four-year period, commencing at the conclusion of the information-retention period provided in the preceding Paragraph, the City shall notify the United States at least 90 days prior to the destruction of any documents, records, or other information subject to the requirements of the preceding Paragraph, and, upon request by the United States, the City shall deliver any such documents, records, or other information to EPA. Upon conclusion of this four-year period the City may destroy any such documents, records, or other information subject to the requirements of the preceding Paragraph without notifying the United States or the EPA. Nothing in this Paragraph should be construed to permit the destruction or non-retention of documents, records or other information that is required by any provision of 40 C.F.R. Part 280 or other applicable law.

56. The City may also assert that information required to be provided under this Section is protected as Confidential Business Information ("CBI") under 40 C.F.R. Part 2. As to any information that the City seeks to protect as CBI, the City shall follow the procedures set forth in 40 C.F.R. Part 2.

57. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States pursuant to applicable federal laws, regulations, or permits, nor does it limit or affect any duty or obligation of the City to maintain documents, records, or other information, imposed by applicable federal or state laws, regulations, or permits.

XII. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

58. This Consent Decree resolves the civil claims of the United States for the violations alleged in the Complaint filed in this action through the date of lodging of the Consent Decree.

59. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree, except as expressly stated herein. This Consent Decree shall not be construed to limit the rights of the United States to obtain penalties or injunctive relief under the Act or implementing regulations, or under other federal laws, regulations, or permit conditions, except as expressly specified

herein. The United States further reserves all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or the environment arising at, or posed by, the City's Facilities, whether related to the violations addressed in this Consent Decree or otherwise.

60. This Consent Decree is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. The City is responsible for achieving and maintaining complete compliance with all applicable federal, State, and local laws, regulations, and permits; and the City's compliance with this Consent Decree shall be no defense to any action commenced pursuant to any such laws, regulations, or permits. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that the City's compliance with any aspect of this Consent Decree will result in compliance with provisions of the Act, 42 U.S.C. § 6991 et seq., or with any other provisions of federal, State, or local laws, regulations, or permits.

61. This Consent Decree does not limit or affect the rights of the City or of the United States against any third parties, not party to this Consent Decree, nor does it limit the rights of third parties, not party to this Consent Decree, against the City, except as otherwise provided by law.

62. This Consent Decree shall not be construed to

create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

XIII. COSTS

63. The Parties shall bear their own costs of this action, including attorneys' fees, except that the United States shall be entitled to collect the costs (including attorneys fees') incurred in any action necessary to collect any portion of the civil penalty or any Stipulated Penalties due but not paid by the City.

XIV. NOTICES

64. Unless otherwise specified herein, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and addressed as follows:

To the United States:

United States Attorney
U.S. Attorney's Office
for the Southern District of New York
86 Chambers Street, 3rd Floor
New York, NY 10007
Attention: Sarah E. Light
Ref: USAO No. 2002V00476

and

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Box 7611 Ben Franklin Station
Washington, D.C. 20044-7611
Re: DOJ No. 90-7-1-07807

To EPA:

Rudolph Perez, Esq.
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866

Dennis McChesney
Chief, Groundwater Protection Section
Division of Enforcement and Compliance Assistance
U.S. Environmental Protection Agency
Region 2
290 Broadway, 20th Floor
New York, NY 10007-1866

To Defendant:

Corporation Counsel of the City of New York
Office of the Corporation Counsel
100 Church Street
New York, NY 10007
Attention: Gail C. Saunders

65. Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above.

66. Notices submitted pursuant to this Section shall be deemed submitted upon mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

XV. EFFECTIVE DATE

67. The Effective Date of this Consent Decree shall

be the date upon which this Consent Decree is entered by the Court.

XVI. RETENTION OF JURISDICTION

68. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, pursuant to Sections X and XVII, or effectuating or enforcing compliance with the terms of this Decree.

XVII. MODIFICATION

69. The terms of this Consent Decree may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to any term of this Decree, it shall be effective only upon approval by the Court. The terms and schedules contained in Appendix A of this Decree may be modified upon written agreement of the Parties without Court approval, unless any such modification effects a material change to the terms of this Consent Decree or materially affects the City's ability to meet the requirements or objectives of this Decree.

XVIII. TERMINATION

70. After the City has maintained continuous compliance with the requirements of the Act, and with this Consent Decree, for a period of no less than one (1) year after

the completion of permanent closure, upgrades and other injunctive relief required under Paragraph 10 of this Consent Decree; has complied with all other requirements of this Consent Decree, including those relating to Centralized Monitoring required by Section VI of this Consent Decree; and has paid the civil penalty and any accrued Stipulated Penalties as required by this Consent Decree, the City may serve upon the United States a Request for Termination of the Consent Decree (except for the provisions of Paragraphs 54 and 55) in accordance with Section XVIII, stating that the City has satisfied those requirements, together with all necessary supporting documentation.

71. Following receipt by the United States of the City's Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether the City has satisfactorily complied with the requirements for termination of this Consent Decree. If the United States agrees that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree (except for the provisions of Paragraphs 54 and 55).

72. If the United States does not agree that the Decree may be terminated, the City may invoke Dispute Resolution under Section X of this Decree. However, the City shall not seek

Dispute Resolution of any dispute regarding termination, under Paragraph 46 of Section X, until at least 60 days after service of its Request for Termination.

73. The United States may request that the Court terminate this Consent Decree at any time after five (5) years from the Effective Date of this Consent Decree.

XIX. PUBLIC PARTICIPATION

74. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. The City consents to entry of this Consent Decree without further notice.

XX. SIGNATORIES/SERVICE

75. Each undersigned representative of the City, the United States Attorney's Office and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

76. This Consent Decree may be signed in

counterparts, and its validity shall not be challenged on that basis.

77. The City agrees not to oppose entry of this Consent Decree by the Court or to challenge any provision of the Decree, unless the United States has notified the City in writing that it no longer supports entry of the Decree.

78. The City agrees to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

XXI. INTEGRATION

79. This Consent Decree and its Appendix constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersede all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. Other than the Appendix, which is attached to and incorporated in this Decree, and submittals that are subsequently submitted and approved pursuant to this Decree, no other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing

the terms of this Decree.

XXII. FINAL JUDGMENT

80. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States and the City.

XXIII. APPENDIX

81. The following appendix is attached to and incorporated into this Consent Decree:

"Appendix A" constitutes the list of USTs and/or UST systems described in Paragraph 10(b) of this Consent Decree, with a schedule for upgrades for those USTs and/or UST systems.

Dated and entered this ____ day of _____, 2006.

SO ORDERED:

UNITED STATES DISTRICT JUDGE
Southern District of New York

United States v. City of New York, 02 Civ. 9653 (S.D.N.Y.)
Consent Decree

FOR PLAINTIFF UNITED STATES OF AMERICA:

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
Attorney for the Plaintiff

Date: _____, 2006

By: _____

SARAH E. LIGHT (SL-9869)
EDWARD SCARVALONE (ES-4880)
Assistant United States
Attorneys
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel. No.: (212) 637-2774; 2734
Fax. No.: (212) 637-2686

United States v. City of New York, 02 Civ. 9653 (S.D.N.Y.)
Consent Decree

Date: 1/18/06, 2006

SUE ELLEN WOOLDRIDGE
Assistant Attorney General
Environment and Natural
Resources Division
United States Department of
Justice

United States v. City of New York, 02 Civ. 9653 (S.D.N.Y.)
Consent Decree

Date: _____, 2006

ERIC SCHAAF
REGIONAL COUNSEL

Date: _____, 2006

RUDOLPH PEREZ
Assistant Regional Counsel
United States Environmental
Protection Agency, Region 2
290 Broadway
New York, New York 10007
Tel. (212) 637-3220

United States v. City of New York, 02 Civ. 9653 (S.D.N.Y.)
Consent Decree

FOR DEFENDANT:

MICHAEL A. CARDOZO
CORPORATION COUNSEL OF THE
CITY OF NEW YORK
Attorney for the Defendant

Date: _____, 2006

By:

GAIL C. SAUNDERS, ESQ. (GS-0292)
100 Church Street
New York, NY 10007
Tel. 212-788-1238

APPENDIX A

APPENDIX A

New York City Underground Storage Tanks Cathodically Protected Systems Repair/Tank Upgrade/Replacement

No	Recommended Action	Owner	Site Name	Date Inspected	Tank No	Capacity	Product	Completion Date
1	Replace Tank	DEP	BWT - Tallman Is	09/03/2003	1	550	Diesel	03/22/2007
2	Replace Tank	DEP	BWT - Tallman Is	09/03/2003	2	550	Gasoline	03/22/2007
3	Replace Tank	DEP	BWT - Tallman Is	09/03/2003	3	550	Gasoline	03/22/2007
4	Install Impressed Current	DEP	Eltingville Pump Station	09/10/2003	1	3000	E Generator	03/22/2007
5	Install Impressed Current	DEP	Gowanus Pumping Station	09/04/2003	1	1500	E Generator	03/22/2007
6	Install Impressed Current	DEP	Gowanus Pumping Station	09/04/2003	2	1500	E Generator	03/22/2007
7	Install Impressed Current	DEP	Port Richmond WPCP	09/10/2003	2	3000	E Generator	03/22/2007
8	Replace Tank	DOC	Repair Shop Rikers Is.	09/11/2003	1	3000	Diesel	09/27/2007
9	Replace Tank	DOC	Repair Shop Rikers Is.	09/11/2003	2	1500	Gasoline	09/27/2007
10	Replace Tank	DOC	Repair Shop Rikers Is.	09/11/2003	3	1500	Gasoline	09/27/2007
11	Replace Piping	DOS	Bronx 1/3/4	08/25/2003	1	2000	Diesel	07/20/2006
12	Replace Piping	DOS	Bronx 1/3/4	08/25/2003	2	2000	Diesel	07/20/2006
13	Replace Piping	DOS	Bronx 1/3/4	08/25/2003	3	1080	Gasoline	07/20/2006
14	Replace Tank	DOS	Bronx 7 & 8	08/26/2003	1	2000	Diesel	12/21/2006
15	Replace Tank	DOS	Bronx 7 & 8	08/26/2003	2	2000	Diesel	12/21/2006
16	Replace Tank	DOS	Bronx 9 & 10	08/25/2003	1	2000	Diesel	12/21/2006
17	Replace Tank	DOS	Bronx 9 & 10	08/25/2003	2	2000	Diesel	12/21/2006
18	Replace Tank	DOS	Brooklyn West 7/10	09/08/2003	1	2000	Diesel	12/21/2006
19	Replace Tank	DOS	Brooklyn West 7/10	09/08/2003	2	2000	Hoist Oil	12/21/2006
20	Replace Piping	DOS	Manhattan 10	08/26/2003	1	1080	Gasoline	12/21/2006
21	Replace Tank	DOS	Manhattan 10	08/26/2003	3	2000	Diesel	12/21/2006
22	Replace Tank	DOS	Manhattan 10	08/26/2003	2	2000	Diesel	12/21/2006
23	Investigate Tank Age/upgrade/replace	DOS	Manhattan 2	08/27/2003	2	2000	Diesel	09/27/2007
24	Investigate Tank Age/upgrade/replace	DOS	Manhattan 2	08/27/2003	1	2000	Diesel	09/27/2007
25	Replace Piping	DOS	Queens 11 & 13A	08/28/2003	6	4000	Diesel	05/20/2007
26	Replace Piping	DOS	Queens 11 & 13A	08/28/2003	7	4000	Diesel	05/20/2007
27	Replace Piping	DOS	Queens 11 & 13A	08/28/2003	9	2000	Diesel	05/20/2007
28	Replace Piping	DOS	Queens 11 & 13A	08/28/2003	10	2000	Gasoline	05/20/2007
29	Replace Piping	DOS	Queens 11 & 13A	08/28/2003	1	1000	Motor Oil	05/20/2007
30	Replace Piping	DOS	Queens 11 & 13A	08/28/2003	2	1000	Motor Oil	05/20/2007
31	Replace Piping	DOS	Queens 11 & 13A	08/28/2003	3	1000	Waste Oil	05/20/2007
32	Replace Piping	DOS	Queens 11 & 13A	08/28/2003	4	1000	Hoist Oil	05/20/2007
33	Replace Tank	DOS	Queens 14	09/08/2003	1	2000	Diesel	06/20/2006
34	Replace Tank	DOS	Queens 14	09/08/2003	2	2000	Diesel	06/20/2006
35	Replace Tank	DOS	Queens 14	09/08/2003	3	2000	Gasoline	06/20/2006
36	Install Impressed Current	DOS	Queens West 2, 3, 4	09/09/2003	2	2000	Hoist Oil	05/20/2007
37	Install Impressed Current	DOS	Queens West 2, 3, 4	09/09/2003	1	2000	Motor Oil	05/20/2007
38	Install Impressed Current	DOS	Queens West 2, 3, 4	09/09/2003	3	2000	Tranny Fluid	05/20/2007
39	Install Impressed Current	DOS	Queens West 2, 3, 4	09/09/2003	4	2000	Waste Oil	05/20/2007
40	Replace Tank	DOS	Staten Island 3	09/10/2003	1	4000	Diesel	05/21/2006
41	Replace Tank	DOS	Staten Island 3	09/10/2003	2	4000	Diesel	05/21/2006
42	Install Imp Cmt & Liner	FDNY	EC 222	09/05/2003	1	1000	Diesel	06/20/2007
43	Replace Tank	FDNY	EC 39	09/02/2003	1	1000	Diesel	06/20/2007
44	Replace Tank	FDNY	EC 4	08/27/2003	1	2000	Diesel	10/23/2006
45	Replace Tank	FDNY	Penn Station	09/08/2003	1	1080	Diesel	02/23/2007
46	Replace Tank	NYPD	19th Precinct	09/02/2003	1	4000	Gasoline	09/23/2007
47	Replace Tank	NYPD	Highway #1	09/12/2003	1	2500	Gasoline	09/23/2007
48	Replace Tank	NYPD	Highway #1	09/12/2003	2	550	Gasoline	09/23/2007
49	Replace Tank	NYPD	Midtown North	09/11/2003	1	4000	Gasoline	09/23/2007
50	Replace Tank	TLC	Taxi & Limo Commission	09/03/2003	1	4000	Gasoline	03/22/2007
51	Replace Tank	TLC	Taxi & Limo Commission	09/03/2003	2	4000	Gasoline	03/22/2007